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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 696

WILLIAM J. ALLISON,
Appellant

vs.

THE STATE OF INDIANA,
Appellant

STATEMENT AS TO JURISDICTION

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INDEX

	Page
Statement as to Jurisdiction	1
Opinion Below	
(1) Majority Opinion	2
(2) Dissenting Opinion	2
Jurisdiction	
(1) Nature of Proceeding and Statute Pursuant to which it is brought	2
(2) Date of Judgement or Decree	3
(3) Statutory Provision Believed to Confer Jurisdiction	3
(4) Cases Believed to Sustain the Jurisdiction	3
(5) Text of Statute	5
Questions Presented	5
Statement of Case	6
The Federal Questions are Substantial	9
Conclusion	14

TABLE OF AUTHORITIES CITED

CASES

Alford v. United States, 282 US 687	5, 12
Arms v. Pierce, Gov. Co. 12, Ind. App. 566	12
Bartell vs. United States, 227 US 427 (1913)	13
Booher v. State (1926) 198 Ind. 319	11, 22, 29
Burton vs. United States, 202 US 344 (1906)	13
Callaher v. State, 193 Ind. 629	4, 10
Calder v. Bull, 3 Del. 386 (1798)	13
Cantwell v. Conn., 310 US 296	10
Caudill v. State, 224 Ind. 531	28
Cline v. Frink Dairy, 274 US 445 (1927)	13
Cole v. Arkansas, 338 US 345 (1949)	13
Connell v. State, 215 Ind. 318	18
Connelly v. General Construction Co., 269 US 385	4, 10
Donnelly v. United States, 276 US 305	4, 10
Espenlaub v. State, 210 Ind. 687	11
Glover v. State, 179 Ind. 459	18
Goldstine v. State, 230 Ind. 343	24
Guetling v. State, 198 Ind. 718	27
Hawkins v. State (1941) 218 Ind. 116	11

Hedderich v. State, 101 Ind. 564 ..... 4, 10
Herndon v. Lowery, 301 US 242 ..... 4, 10
Hitch v. State, 210 Ind. 588 24
Kraus Bros. v. United States, 327 US 614 (1946) 12
Lawgetta v. New Jersey, 306 US 451 (1939) 13
Moore v. State, 183 Ind. 114 ..... 4, 10
McMullin v. Cannon (1958), Ind. App. 150 N.E. 765 12
McNamara v. State, 203 Ind. 596 25
Petro v. State (1933), 204 Ind. 401 11
Pierce v. United States, 314 US 306 ..... 4, 10
Rhuberg v. United States, 255 Fed. 865 11
Robinson v. State, 232 Ind. 396 ..... 20, 25, 26
Screws v. United States, 325 US 91 (1945) 12
Smith v. State (1917), 186 Ind. 252 ..... 4, 10, 28
State v. Bridgewater, 171 Ind. 1 (1908) 25, 26
State v. Diamond, 27 N.M. 477, 20 ALR 1527 Annot.
70 L. Ed. 322 10
Stomberg v. California, 283 US 359 ..... 4, 10
Sunderman v. State, 197 Ind. 705 ..... 18, 25
United States v. Cohen Grocery Co., 264 Fed. 218 (1920) 12
United States v. L Cohen Grocery, 255 US 81 ..... 4, 10, 12
United States v. Carle, 105 US 611 (1882) 13
United States v. Cruckshank, 92 US 542 (1876) 13
United States v. Resnick, 299 US 267 ..... 4, 10
United States v. Simmons, 96 US 360 (1878) 13
Viereck v. United States, 318 US 236 (1943) 12
Vorhis v. State, 233 Ind. 105 11
Webster New International Dictionary 4
Winston Dictionary, College Edition (1947) 4
Winters v. New York, 333 US 507 ..... 3, 10, 13

STATUTES

Indiana Statute — Burns 1955 Cum Supp. 5
Acts 1957, Ch. 61, Sec. 10-1511 ..... 2, 5
28 United States Code Annotated, Sec. 1257 (2) 3

CONSTITUTION

United States — Article 1, Section 10 13
United States — 5th Amendment 4
United States — 6th Amendment 4, 12
United States — 14th Amendment 9, 10, 13
Indiana — Article I, Section 13 9

APPENDIX A

Copy of Majority Opinion of Indiana Supreme Court 16

APPENDIX B

Copy of Dissenting Opinion 23

APPENDIX C

Copy of Judgement, Order and Decree Appealed From 30

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

WILLIAM J. ALLISON,
Appellant

vs.

THE STATE OF INDIANA,
Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Supreme Court of the United States, William J. Allison, Appellant herein, submits herewith his statement, particularly disclosing the basis upon which the Supreme Court of the United States has Jurisdiction on Appeal to review the judgment of the Supreme Court of Indiana entered in this cause.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in 166 N.E. (2d) page 171. (Opinion rendered April 18, 1960; rehearing denied May 23, 1960). The case is not yet reported in the Indiana Reports. The majority opinion of the Court is Appendix "A," attached hereto. The dissenting opinion is Appendix "B," attached hereto.

JURISDICTION

The appellant was convicted upon a trial by jury on two counts charging the misdemeanor of disorderly person while using the telephone under Acts 1957, ch. 61, par. 1, p. 114, being 10-1511, Burns' 1956 Replacement. The indictment in two counts was as follows:

> "The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that..... WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON .....
> .....
> on or about the 16th day of May, A.D. 1957 at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, and addressed the said BERNARD W. WYNN lewd, lascivious and indecent words or language, the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.
>
> /s/ JOHN G. TINDER
> Nineteenth Judicial Circuit
> Prosecuting Attorney

"Count Two:

The Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge that WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON on or about the 16th day of May, A.D. 1957, at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harrassing the said BERNARD W. WYNN or his family, then and there being.....
contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Nineteenth Judicial Circuit
Prosecuting Attorney

A motion to quash was directed to both counts. It is urged that both counts of the indictment are bad for the reason that it does not set out verbatim the lewd and indecent words and language used over the telephone and that the language of the statute is not sufficiently specific.

The Judgment of the Supreme Court of Indiana was entered on the 18th day of April, 1960, and an order was entered on the 23rd day of May, 1960, denying a petition for rehearing; Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Indiana on May 24, 1960.

The Jurisdiction of the Supreme Court of the United States to review this decision and judgment by direct appeal is conferred by Title 28, United States Code Annotated, Sec. 1257 (2).

Cases believed to sustain the jurisdiction of this Court are as follows:

(a) State statute involved is vague, uncertain and indefinite.

Winters vs. New York
333 US 507

Stomberg vs. California
283 US 359

Herndon vs. Lowry
301 US 242

(b) There must be an ascertainable standard of guilt.

Connelly vs. General Construction Co.
269 US 385

Pierce vs. United States
314 US 306

United States vs. L. Cohen Grocery
255 US 81

(c) State statutes must use words of determinative meaning.

United States vs. Resnick
299 US 207

Donnelly vs. United States
276 US 305

Webster's New International Dictionary

The Winston Dictionary, College Edition (1947)

Callaher vs. State
193 Ind. 629

Smithe vs. State
186 Ind. 252

Moore vs. State
183 Ind. 114

Hedderich vs. State
101 Ind. 564

5th Amendment to the United States Constitution

6th Amendment to the United States Constitution

Alford vs. United States
282 US 687
(Reversible error for the trial judge to refuse the defendant's counsel the right of cross-examination)

The text of the statute, namely, Indiana Statute, Acts of 1957, Chapter 61, page 114, being Burns 1959 Cumulative Supplement, Section 10-1511, reads as follows:

> "Annoying, molesting or harassing another or indecent language by telephone calls—Whoever telephones another person and addresses to or about such other person any lewd, lascivious or indecent words or language; or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family, shall be deemed guilty of the misdemeanor of being a disorderly person, and, not exceeding five hundred dollars ($500.00), to which may be added imprisonment in the county jail not exceeding six (6) months. Provided, that any offenses committed by the use of a telephone as herein set out may be deemed to have been committed at either the place at which the telephone call or calls were made, or at the place where the telephone call or calls were received."

QUESTIONS PRESENTED

The questions presented in this appeal are as follows:

(a) The constitutionality and validity of the State's statute involved, which was hereinabove set out.

(b) The legal sufficiency of the indictment drawn under said statute, and the legal sufficiency of Count One and Count Two of said indictment drawn thereunder.

(c) The erroneous holding, ruling, decision and judgment of the majority opinion of the Indiana Supreme Court that Count One and Count Two of the indictment were sufficient, and the erroneous holding, ruling, decision and judgment of the major-

ity opinion of the Indiana Supreme Court affirming the action of the lower court in overruling and denying appellant's Motion to Quash Count One and Count Two of said indictment.

(d) DENIAL OF THE RIGHT OF CROSS-EXAMINATION OF STATE'S WITNESSES BY DEFENDANT.

(e) The 5th Assignment of Error, urged and raised by appellant in the Supreme Court of Indiana, which reads as follows:

"The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself."

which said Verified Motion by appellant was supported by an affidavit of one of appellant's counsels in the Criminal Court of Marion County, Division No. 1, the trial court, which includes pages 24 through 38 of the transcript in said cause.

(f) PERMITTING TESTIMONY RELATIVE TO ALLEGED TELEPHONE CALLS WHICH OCCURRED PRIOR TO EFFECTIVE DATE OF SUCH STATUTE.

(g) Permitting testimony as to arrest and number thereof of a witness (defendant-appellant).

(h) Refusing appellant's counsel the right to cross-examine State's witnesses as to the conversations and place of residence.

(i) Refusing appellant's counsel the right to inquire and cross-examine as to the residence of the witness for the prosecution.

STATEMENT OF CASE

On May 23, 1957, the Grand Jury of Marion County, Indiana, returned an indictment against appellant William J. Allison in two counts charging the misdemeanor of disorderly person while using the telephone. The indictment, omitting the caption and formal parts, reads as follows, to-wit: (See Page 2, under heading "Jurisdiction")

Appellant Allison on July 8, 1957, filed his "Verified Motion of William T. Allison Requesting that the Honorable John L. Niblack Disqualify Himself from Serving as Judge in the Above Cause," and one of his attorneys at the time, Joseph Kivett, filed his affidavit in support thereof. The Court overruled and denied the Motion to disqualify himself, and appellant Allison on July 8, 1957, filed a Motion to Quash each cont of the indictment, which, omitting the caption and formal parts, reads as follows:

"Comes now the defendant and moves the court to quash Count One of the above indictment on the following grounds:

(1) The facts stated in said indictment do not constitute a public offense.

(2) Said indictment does not state the offense charged with sufficient certainty.

WHEREFORE, the defendant asks that this motion to quash the indictment be in all things sustained.

KIVETT AND KIVETT
s/ By J. L. Kivett
s/ S. C. Kivett

"Comes now the defendant and moves the Court to quash Count Two of the above indictment on the following grounds:

(1) The facts stated in said indictment do not constitute a public offense.

(2) Said indictment does not state the offense charged with sufficient certainty.

WHEREFORE, the defendant asks that this motion to quash the indictment be in all things sustained.

KIVETT AND KIVETT
s/ By J. L. Kivett
s/ S. C. Kivett
Attorney for Defendant

On October 3, 1957, appellant's Motion to Quash each count of the indictment was overruled, and on October 7, 1957, the defendant waived arraignment and plead Not Guilty. On March 26, 1958, trial was commenced and held by jury and on March 28, 1958, the evidence was heard and completed. A verdict of Guilty was returned on March 28, 1958, and the Court entered judgment as follows:

> "The defendant for the crime committed be, and hereby is, on Count 1 of the Indictment, fined in the sum of five hundred dollars ($500.00) and costs; and sentenced to the Marion County Jail for a period of six (6) months; and on Count 2 of the Indictment, fined in the sum of five hundred dollars ($500.00) and costs; and sentenced to the Marion County Jail for a period of six (6) months. Costs of this action taxed at $426.0 Surety is released."

On April 25, 1958, appellant duly, timely and properly filed his Motion for New Trial, which embraced thirty grounds and reasons, and the same was by the trial court overruled on June 17, 1958.

The appellant thereupon appealed the judgment of the trial court, the Criminal Court of Marion County, Division No. 1, to the Supreme Court of Indiana and assigned as errors therein the following Assignment of Errors, to-wit:

> "Comes now the appellant and says that there is manifest error in the proceeding and judgment of the trial court prejudical to him in that:
>
> 1. The trial court erred in overruling apellant's Motion to Quash each count of the Indictment.
>
> 2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the Indictment.
>
> 3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the Indictment.
>
> 4. The trial court erred in overruling appellant's Motion for a New Trial.
>
> 5. The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself.

WHEREFORE, appellant prays that the judgment of the trial court be reversed and for all other proper relief in the premises.

/s/ Frank A. Symmes
Attorney for Appellant"

On April 18, 1960, the Supreme Court of Indiana by majority opinion affirmed the judgment of the Criminal Court of Marion County, Division No. 1, and appellant timely and properly filed a Petition for Re-Hearing, which was denied by majority opinion of the Supreme Court of Indiana on May 23, 1960, and it is from this decision and judgment that this appeal is taken, presented and prosecuted to this Court. FILING DATE EXTENDED TO FEB 6 1961 UNDER RULE 13 (1)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Federal questions are substantial and were timely and properly raised in the trial court by the Motion to Quash Count One and Count Two of the Indictment and the assigned and alleged failure to set out specific words in the indictment invalidated the same and thus the due process of law clause of the 14th Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of Indiana is drawn in question here.

All during the trial in the trial court appellant timely and properly raised Federal questions and the Indiana Supreme Court, in rendering its decision and judgment, did have substantial Federal questions before it. The Supreme Court of Indiana denied the Petition for Re-Hearing and passed on the Federal questions alleged in the trial court and in the Appeal and in the Petition for Re-Hearing, all three of which raised substantial Federal questions, *and therefore this Court has jurisdiction over this appeal.* The appellant has properly and timely presented and raised Federal questions on appeal to the Supreme Court of Indiana, and the Indiana Supreme Court passed on, adjudicated and ruled on the same and thus the Federal ques-

tions which appellant alleges for this appeal are substantial.

It is well settled that a statute so vague and indefinite as to permit within the scope of its language punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment to the Constitution of the United States. Winters v. New York, 333 United States 507; Stomberg v. Calif., 283, U.S. 359; Herndon v. Lowry, 301 U.S. 242.

There must be an ascertainable standard of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. Connolly v. General Construction Co., 269 U.S. 385. *Behind this rule is the requirement of fair notice of what conduct may entail punishment.*

It is well-settled that standards of certainty in statutes punishing for offenses is higher than in those depending upon civil sanction for enforcement. Pierce v. U.S., 314 U.S. 306; Cantwell v. Conn., 310 U.S. 296; Callaher v. State, 193 Ind. 629; Smithe v. State, 186 Ind. 252; Moore v. State, 183 Ind. 114; Hedderich v. State, 101 Ind. 564.

The Fifth and Sixth Amendments to the United States Constitution require that the ascertainable standard of guilt be fixed by the legislature, rather than by Courts and juries. United States v. L. Cohen Grocery, 255 US 81.

The statute must use words of determinative meaning. State v. Diamond, 27 N.M. 477, 20 ALR 1527, Annot. 70 L. Ed. 322.

Before a person can be punished, his case must be plainly and unmistakably within the statute. United States v. Resnick, 299 US 267; Donnelley v. United States, 276 US 305.

The sole question involved is whether or not the legislature spelled out the offenses with the necessary definiteness. The Indiana General Assembly has violated the 14th Amendment to the United States Constitution in that by this statute it deprives

this defendant Allison of life and liberty (or) property) without due process of law.

IT WAS ERROR TO PERMIT TESTIMONY RELATIVE TO ALLEGED CALLS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE SUBJECT STATUTE.

It is a fundamental rule of law that evidence must be logically relevant, germane and material to facts in issue in the case on trial and must tend to prove or disprove such facts; evidence as to collateral facts is not admissible. Smithe v. State, 212 Ind. 605, 10 N.E. (2nd) 899; Espenlaub v. State, 210 Ind. 687; Vorhis v. State, 233 Ind. 105.

The defendant Allison was irreparably harmed and his rights were prejudiced and jeopardized by the action of the trial court which was affirmed by the majority opinion of the Indiana Supreme Court in admitting evidence of prior legal acts to prove an illegal intent.

Appellant respectfully contends that illegal conduct can't be inferred from a legal act, and that is the specific question at bar, and the contention of the Supreme Court of Indiana in its quoting the case of Booher v. State (1926), 198 Ind. 319, which cited Rhuberg v. United States (1919), 255 Fed. 865, stating "A repetition of acts of the same character naturally indicates the same purpose in all of them; and if, when connected together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator such motive will be considered as prompting each act," the Supreme Court of Indiana strayed to an erroneous precedent and, therefore, begged the essential question.

Inquiry as to arrests of a witness is improper because the law is quite clear that the prosecution in its cross-examination of the defendant is limited to inquiry concerning convictions and not merely arrests. Hawkins v. State (1941), 218 Ind. 116; Petro v. State (1933), 204 Ind. 401.

Appellant had the absolute right to cross-examine witness and the trial court erred in excusing a State's witness before the defense had finished cross-examining the witness. Appellant's right to cross-examine a witness under oath is not a rule of procedure or evidence, but is fundamental to due process and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal. Arms v. Pierce, Gov. Co. 12, Ind. App. 566.

Appellant's counsel should have been permitted to inquire as to the residence of a witness for the prosecution. The law is well settled that while the extent of the cross-examination of a witness rests in the sound discretion of the trial court, such a rule cannot be construed to authorize the right to exclude proper cross-examination. McMullin v. Cannon (1958), Ind. App. 150 N.E. 765. Alford v. United States, 282 U.S. 687.

The Supreme Court of Indiana in addition to the preceding Federal questions which were ruled upon in its decision, had also the following additional authorities and additional citations as requested by said Court in their determination of this case.

Appellant respectfully directs the Court's attention to the following, which is glaringly apparent in its application to the statute in question—"A criminal statute which is so vague that it leaves the standard of guilt to the 'varient views of the different courts and juries which may be called on to enforce it' cannot be squared with this Provision, the Sixth Amendment to the Constitution of the United States." United States v. Potter, 56 Fed. 83, 88 (1892); Viereck v. United States, 318 US 236 (1943); Kraus Bros. v. United States, 327 US 614 (1946); U.S. v. Cohen Grocery Co., 264 F. 218 (1920); Screws v. U.S., 325 US 91 (1945).

No Indictment is sufficient if it does not allege all the ingredients which constitute the crime. Accordingly this Court has held that "The constitutional right to be informed of the nature

and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge." U.S. v. Cruckshank, 92 US 542, (1876); U.S. v. Simmons, 96 US 360 (1878); Bartell v. U.S., 227 US 427 (1913); Burton v. U.S., 202 US 344 (1906).

The facts necessary to bring the case within the statutory definition must also be alleged. U.S. v. Carle, 105 US 611 (1882).

The Constitution of the United States in the Fourteenth Amendment thereof concerning due process of law has repeatedly provided that "A Statute so vague and indefinite in form and as interpreted--(as to fail) to give fair notice of what acts will be punished, . . . violates an accused's rights under procedural due process . . . (a penal statute must set up) ascertainable standards of guilt so that men of common intelligence are not required to guess at its meaning," either as to persons within the scope of the act or as applicable tests to ascertain guilt. Winters v. New York, 333 U.S. 507, (1948); Cline v. Frink Dairy, 274 U.S. 445 (1927); Cole v. Arkansas, 338 U.S. 345 (1949).

It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. Lawgetta v. New Jersey, 306 U.S. 451 (1939).

A law which alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid. Calder v. Bull, 3 Del. 386 (1798).

Article 1, Section 10, of the United States Constitution provides "No State shall pass any ex poste facto law.

CONCLUSION

It is respectfully urged that the appellant, William J. Allison did not receive a fair and impartial trial as guaranteed him by the Fourteenth Amendment to the Constitution of the United States of America, and t hat his constitutional rights were glaringly violated because:

1. The Supreme Court of Indiana by the majority opinion erroneously held that the trial court properly overruled the Motion to Quash Count One and Count Two of the Indictment.

2. The Supreme Court of Indiana erroneously held that the statute in question was constitutional .

3. The Supreme Court of Indiana erroneously held that the trial court properly overruled and denied appellant's motion requesting the Honorable John L. Niblack to disqualify himself.

4. The Supreme Court of Indiana erroneously held that the trial court properly overruled appellant's Motion for New Trial.

5. The Supreme Court of Indiana erred in denying appellant's Petition for Re-Hearing.

6. The Supreme Court of Indiana erroneously held that evidence of alleged acts by appellant before the effective date of the statute in question were properly admitted into evidence.

7. The Supreme Court of Indiana erroneously held that inquiry as to the arrests of a witness is proper.

8. The Supreme Court of Indiana erroneously held that the dismissal of a witness by the trial court over the objections of appellant's counsel before counsel had completed his cross-examination was proper and legal.

9. The Supreme Court of Indiana erroneously held that the trial court properly refused to permit inquiry by appellant's counsel of the residence of a State's witness.

The questions raised in this appeal are so substantial as to deserve plenary consideration by this Court with opportunity for briefs and a hearing on the merits.

Respectfully submitted,

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In the Supreme Court of the United States

WILLIAM JOHN ALLISON, ALIAS WILLIAM THOMAS ALLISON,
Appellant

vs.

STATE OF INDIANA,
Appelle.

No. 29,714

APPEAL FROM THE CRIMINAL COURT OF MARION COUNTY
HON. JOHN L. NIBLACK, SPECIAL JUDGE

ARTERBURN, C.J.

The appellant was convicted upon a trial by jury on two counts charging the misdemeanor of disorderly person while using the telephone under Acts 1957, ch. 61, § 1, p. 114, being § 10-1511, Burns' 1956 Replacement. The indictment in two counts was as follows:

APPENDIX "A"

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that . . . WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON . . . on or about the 16th day of May, A.D. 1917 at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, and addressed to the said BERNARD W. WYNN lewd, lascivious and indecent words or language, the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Prosecuting Attorney
Nineteenth Judicial Circuit

"Count Two:

"The Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge that WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON on or about the 16th day of May, A.D. 1957, at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN or his family, then and there being . . . contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Prosecuting Attorney
Nineteenth Judicial Circuit

A motion to quash was directed to both counts. (It is urged upon us that the first count of the indictment is bad for the reason that it does not set out verbatim the lewd and indecent words and lainguage used over the telephone and that the language of the statute is not sufficiently specific.) The general rule is that

a charge is sufficiently specific if it follows the wording of the statute. The apellant contends that this is one of the exceptions thereto where the statute does set out the specific acts. With this contention we cannot agree. The offense charged here is of such lewd and indecent character that the rules of the pleading with reference thereto are analogous to that in sodomy and such like crimes.

It is generally held in Indiana and other jurisdictions that a detailed description in words of acts of such lewdness and indecency is too revolting to require that the pleadings before a court be so defiled. This Court has said;

> "But by reason of the vile and degrading nature of this crime it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act and where the offense is statutory a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required." *Glover* v. *State* (1913, 179 Ind. 459, 461, 462, 101 N.E. 629, L.R.A., N.S. 473.

Following the above quotation is a long list of citations from other jurisdictions, going back to the time of Lord Coke in the support of such a principle.

In *Connell* v. *State* (1939), 215 Ind. 318, 19 N.E. 2d 267, the principle was again reiterated in this State.

In *Sunderman* v. *State* (1926), 197 Ind. 705, 151 N.E. 829, where a defendant was convicted of selling obscene literature, the affidavit followed the words of the statute and the obscene matter was sufficiently described as "obscene, lewd, lascivious and licentious." The court there said it was sufficient to use the language of the statute and then allege "that the obscene matter is too gross and obscene to be spread upon the records of the court."

In the case before us the indictment also says "the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court."

There is no showing the appellant was in any way misled as to the offense charged.

The motion to quash count one of the indictment was properly overruled.

The motion to quash the second count of the indictment centers primarily about the use of the word "repeatedly" as being too indefinite and the use of the word "or" instead of the word "and" in the portion of the charge which states "that the appellant unlawfully telephoned another person, to-wit: BERNARD W. WYNN *repeatedly* for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN *or* his family." (Our italics) We are not impressed with the argument that the word "repeatedly" is uncertain. Burns' § 9-1125 required that "the words used in an indictment or affidavit must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."

Burns' § 9-1126 states that an indictment shall be sufficient if the offense is clearly set forth "in plain and concise language without unnecessary repetition."

Burns' § 9-1127 states that no indictment shall be quashed "For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Nothing is pointed out in this case whereby the defendant was prejudiced in any fashion by following the words of the statute in the indictment, namely, "repeatedly" or the disjunctive "or".

Normally, acts constituting more than one offense are connected in a statute by the disjunctive "or"; all of such offenses

may be charged in the same court by using the conjunctive "and". The proof of any one of the alleged acts is sufficient to sustain a conviction.

Marshall v. *The State* (1890), 123 Ind. 128, 23 N.E. 1141; *McGregor* v. *The State* (1860), 16 Ind. 9.

In this case two separate offenses are charged and are joined by the disjunctive "or" namely, using lewd and indecent language over the telephone or annoying a person or his family by repeated telephone calls. These two offenses have been stated in separate counts. However, the disjunctive "or" in question here occurs in the second and latter portion of the statute which constitutes a separate offense. (count 2)

The indictment in this case charges specifically that the appellant telephoned another person, "to-wit: BERNARD W. WYNN" and thereafter states in the words of the statute, "for the purpose of annoying, molesting and harassing, the said BERNARD W. WYNN or his family." The act of telephoning Bernard W. Wynn alone for the purpose alleged, defiines and limits specifically the acts.

In *The State* v. *Callahan* (1890), 124 Ind. 364, 24 N.E. 732, a similar attack was made upon an indictment which charged forgery and which alleged that the note was either destroyed "or" in the possession of another person unknown to the grand jurors. This Court held the indictment sufficiently definite and certain.

McGregor v. *The State* (1860), 16 Ind. 9.

In *Robinson* v. *State* (1953), 232 Ind. 396, 398, 112 N.E. 2d 861 we said:

> "The names of third persons who are only incidentally or collaterally connected with the offense charged against an accused need not be stated in an affidavit or indictment."

If such be the law, then to say the telephone calls were made to Bernard W. Wynn for the purpose of annoying him "or his

family" is sufficiently definite.

If one telephones another person who is specifically described by name, as in this case, for any one of the purposes set out in the latter portion of the statute in question, proof of any one of those purposes is sufficient to constitute the crime. Super-technicalities should not be indulged in where the rights of the defendant are not prejudiced thereby and he is in no way misled. Under the statutes of this State we are compelled to ignore such technical objections "which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The trial court did not err in overruling the motion to quash to the second count.

In a number of instances which can be grouped together appellant contends that the court erred in permitting certain witnesses to testify as to telephone conversations over the objection that they did not sufficiently identify the appellant. We have read this testimony and we find the witnesses stated that they recognized the appellant from his voice, with which they were familiar, and also from the fact that he stated his name. In addition, some of the witnesses stated that they either knew him prior to such telephone conversations or subsequently met him and identified the voice. The testimony of witnesses as to the identity of the appellant goes to the weight rather than to its relevancy.

The appellant further contends that the court erred in permitting some of the witnesses to testify as to telephone conversations which the appellant made to them during the year prior to the effective date of the act creating the offense (April 1, 1957.) Insofar as such testimony was admitted for the purpose of identifying the voice and the appellant, it was entirely competent. The appellant, however, contends that some of such testimony was not for the purpose of identification. The State, nevertheless, contends that such testimony was competent and relevant for the purpose of showing the intent and the pattern

of appellant's conduct, even though at the time such conduct was not criminal in nature.

In *Booher v. State* (1926), 198 Ind. 315, 153 N.E. 497, this Court held contrary to the contention of the appellant. In that case this Court stated that in a prosecution for the violation of the liquor laws of this State, prior and similar acts are competent to show an intent and the pattern of the appellant's operations, even though at the time such acts and transactions did not constitute a violation of the law. Authorities are set forth in that case amply supporting the principle stated therein.

It occurs to us that where acts of the nature involved in this case, namely, the use of lewd and indecent language over the telephone are made a crime, prior conduct of that nature which is inherently immoral and improper, even though at the time not a crime, is relevant to show a course of conduct with which the appellant is charged.

The judgment of the trial court is affirmed.

LANDIS AND ACHOR, JJ. CONCUR.
JACKSON, J. DISSENTS WITH OPINION
BOBBITT, J. NOT PARTICIPATING.

In the Supreme Court of the United States

WILLIAM JOHN ALLISON, ALIAS WILLIAM THOMAS ALLISON, *Appellant,* vs. STATE OF INDIANA, *Appellee,*	No. 29,714

DISSENTING OPINION

JACKSON, J.

I dissent from the majority opinion for the following reasons:

The statute upon which such prosecution was based, Acts 1957, ch. 61, 1, p. 114, being 10-1511, Burns' 1959 Cum. Supp., reads as follows:

> "Annoying, molesting or harassing another or indecent language by telephone calls. —Whoever telephones another person and addresses to or about such other person any lewd, lascivious or indecent words or language; or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family, shall be deemed guilty of the misdeamnor of being a disorderly person, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars ($500.00), to which may be added, imprisonment in the county jail not exceeding six (6) months; Provided, that any offenses committed by the use of a telephone as herein set out may be deemed to have been commited at either the place at which the telephone callor calls were made, or at the place where the telephone call or calls were received."

APPENDIX "B"

The indictment on which appellant was tried is set out in the majority opinion.

The sufficiency of the indictment and each count thereof was tested by motion to quash, such motion being overruled as to both counts.

Trial was had by jury resulting in a verdict of guilty on both counts, finding and judgment on each count being that appellant be fined in the sum of Five Hundred Dollars ($500.) and be imprisoned in the County Jail for a period of six months.

Appellant's assignment of errors consists of five specifications, as follows:

"1. The trial court erred in overruling appellant's Motion to Quash each count of the indictment.

"2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the indictment.

"3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the indictment.

"4. The trial court erred in overruling appellant's Motion for a New Trial.

"5. The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself."

Assigned errors one, two and three will be and are considered together. Such motions are based upon the two following statutory grounds:

"1. The facts stated in said indictment does not constitute a public offense.

"2. Said indictment does not state the offense charged with sufficient certainty."

Generally it is sufficient to charge an offense in the substantial language of the statute or the equivalent thereto.

Goldstine v. *State* (1952), 230 Ind. 343, 350, 103 N.E. 2d 438;

Hitch v. *State* (1936), 210 Ind. 588, 591, 4 N.E. 2nd 184;

Such a charge will withstand a motion to quash where the statute defines the offense and enumerates the acts or omissions which constitute a crime. However, this general rule does not apply where the statute defines the crime in general terms or includes generic classifications. In such an instance the charge must be framed with particularity.

Robinson v. *State* (1953), 232 Ind. 396, 398, 112 N.E. 2d 861;

McNamara v. *State* (1932), 203 Ind. 596, 603, 181 N.E. 512;

State v. *Bridgewater* (1908), 171 Ind. 1, 4, 85 N.E. 715;

Charging a crime such as is involved herein presents certain peculiar problems due to the nature and substance of the offense. It has been held that in framing an indictment charging the publication or dissemination of obscene, lewd, or lascivious material it is sufficient to set out a general allegation of obscenity in the language of the statute with the explanation that the text of the objectionable matter is so gross as to be offense to the court.

Sunderman v. *State* (1926), 197 Ind. 705, 707, 151 N.E. 829, and cases cited therein.

These cases hold that a conclusion of obscenity charged in the generic language of the statute is sufficient to withstand a motion to quash. Underlying this particular isolated problem of charging the crime involving lewd or obscene matter there exists that basic conflict which is inherent in the whole of our law, that is public interest versus individual right. Here we have a social interest in withholding such filth and obscenity from the face of the record in the interest of public decency and judicial dignity. Opposing this interest is the right of the individual defendant to be specifically and precisely charged so that he may be fully apprised of the charges against him and make ready his defenses accordingly.

In the Sunderman case, *supra*, this basic conflict of social interest versus individual right was easily reconciled. There the

charge involved *printed matter*. The indictment was sufficient in its general references to said printed matter and the allegedly obscene publication could be preserved for subsequent presentation upon the trial of the accused. Thus the public interest in excluding the test of the obscene matter from the face of the record could be served without jeopardizing the right of the defendant to be charged with particularity.

Robinson v. *State*, *supra*, (1953), 232 Ind. 396, 398, 112 N.E. 2d 861.

In the instant case the corpus delecti of the crime consists of nothing more tangible than spoken words rather than printed or written matter. The evanescent and transitory nature of such oral utterances requires that the words themselves be set out on the face of the indictment so that the accused may be cognizant of the precise substance of the charge against him. Spoken words do not accomodate incorporation by reference as does printed matter. For this reason the indictment "must be so clear and distinct that there may be no difficulty in determining what evidence is admissible thereunder."

State v. *Bridgewater*, *supra*, (1908, 171 Ind. 1, 4, 85 N.E. 715.

We may reason by analogy from the Goldstine case, *supra*, wherein the defendant was charged with the offense of possessing "burglar tools." The opinion by Jasper, J. states that "The words 'burglar tools or implements,' as used therein, are of such a general character that they are not sufficiently certain in themselves to apprise the accused of the charge when a motion to quash is filed." It is therefore concluded that "* a substantial description of the tools is necessary to advise appellant of the crime with which he is charged." This reasoning applies with equal force to the case at hand. The generic classification of "lewd, lascivious or indecent words or language" and the definition of what conduct constitutes the offense of telephoning "another person repeatedly for the purpose of annoying, molest-

ing or harassing such other person" is no more specific and certain than the term "burglar tools or implements."

In the stant case a generic charge in the terms of the statute cannot serve to afford the accused the full measure of his rights. In such a case the public interest in withholding such obscenities from the record is necessarily subservient to the individual right of the accused to be apprised of the specific charge lodged against him.

Count one does not apprise the defendant of what he is alleged to have said, and it does not inform him of the nature of the accusation in such a manner as to enable him to prepare a defense, nor does it afford him protection against double jeopardy because it does not point out the specific facts upon which the state is basing its case. *Goldstine* v. *State*, *supra*, (1952), 230 Ind. 343, 350, 103 N.E. 2d 438.

Count two of the indictment recites that the defendant telephone " * * another person, to-wit:
BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN, or his family * * *."

The statute directed to this part recites "* * or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family shall be deemed guilty of a misdemeanor * * *."

The motion to quash count two is also based upon the statutory grounds as set forth above, being the failure of the indictment to state a public offense, and, secondly, that the offense is not stated with sufficient certainty.

Criminal statutes must contain an ascertainable standard of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.

Guetling v. *State* (1927), 198 Ind. 718, 726, 153 N. E. 765.

Behind this rule is the requirement of fair notice of what conduct may entail punishment.

> "To be enforceable a criminal statute must clearly and definitely define the crime so that an ordinary person may know with certainty when he is violating it * * *."
>
> *Caudill* v. *State* (1946), 224 Ind. 531, 534, 69 N.E. 2d 549.

In creating and defining a public offense, unknown at common law, the statute must be sufficiently certain to show what the Legislature intended to prohibit and punish or is will be struck down as being void for vagueness.

Smith v. *State* (1917), 186 Ind. 252, 256, 115 N.E. 943.

It is to be conceded that the statute here in question meets this minimum test of certainty and adequately conveys the Legislative intent to "a person of ordinary intelligence." The fact that the instant statute defines the offense in generic terms does not necessarily render it invalid. However, a charge drawn under this act must necessarily supply the particulars of the crime charged. A statute which defines a crime in general language may be sufficient, but an indictment framed thereunder must charge the offense with particularity. In framing a charge under such an act as is here involved, the general statutory language must be supplemented by an indictment or affidavit which either states facts sufficient to apprise the accused of the specific words or language used and the approximate time when the alleged telephone call was made, or if the charge is for repeatedly telephoning another person for the purpose of annoyance, harassment or molestation, the facts showing when such calls were made should be set out in the indictment or affidavit so that an accused cannot be indicted for one series of telephone calls and convicted on another.

A charge in the words of the staute, Acts 1957, ch. 61, 1, p. 114, being 10-1511, Burns' 1959 Cum. Supp., supra, is not alone sufficient to meet these requirements.

I am also in utter disagrement with the statement in the majority opinion that "* * * prior and similar acts are competent to show an intent and the pattern of the appellant's operations, even though at the time such acts and transactions did not constitute a violation of the law. * * * It occurs to us that where acts of the nature involved in this case, namely, the use of lewd and indecent language over the telephone are made a crime, prior conduct of that nature which is inherently immoral an improper, even though at the time not a crime, it relevant to show a course of conduct with which the appellant is charged."

The defendant is not charged with "a course of conduct," he is charged with the commission of a crime. A staute of 1852, not repealed, declared that all "Crimes and misdemeanors shall be defined and punishment therefor fixed by stautes of this state and not otherwise." 1 R.S. 1852, ch. 61, 2, p. 351, being 9-2401 Burns' 1956 Replacement. The language of the majority opinion implies that a criminal intent may be inferred from the commission of an act not in itself a crime. Such, I submit, is not the law in Indiana, nor should it be. The case relied upon in the majority opinion, *Booher* v. *State* (1926), 198 Ind. 315, 153 N.E. 497, was a prosecution for a conspiracy to transport liquor in an automobile, it is not in point, nor applicable here, for the reason that it dealt with a conspiracy and a different rule of law would apply.

The judgment of the trial court should be reversed with instructions to sustain appellant's motion to quash the indictment and each count hereof.

STATE OF INDIANA
CLERK OF SUPREME AND
APPELLATE COURTS
Alice C. Whitecotton, Clerk
217 State House

Indianapolis 4
Telephone Melrose 4-3129

WILLIAM J. ALLISON
vs.
THE STATE OF INDIANA
No. 29, 714

You are hereby notified that the Supreme Court has on this day denied Appellant's Petition for Re-Hearing.

ARTERBURN, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court.
this 23rd day of May, 1960

/s/ Alice C. Whitecotton By M. Kruse
Clerk Supreme and Appellate Courts

Return this portion.
I hereby acknowledge receipt of the above notice.
_____, 1960

May 23
No. 29, 714

_____
Attorney for _____

cc: Frank A. Symmes, Indianapolis
Edwin K. Steers, Attorney General, Indianapolis

APPENDIX "C"

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1960

No. 696

WILLIAM J. ALLISON,
Appellant,

vs.

THE STATE OF INDIANA,
Appellee.

PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

WILLIAM E. EBBECKE,
312 E. Washington St.,
Nos. 212, 213, 214,
Indianapolis, Indiana,
Attorneys for Appellant.

Central Publishing Co., Inc., Indianapolis, Ind.

INDEX

Page

Citations and Authorities

Alford v. United States, 282 U. S. 687 3

Arms v. Pierce, Gov. Co. 12, Ind. App. 566 3

Hawkins v. State (1941), 218 Ind. 116 3

McMullin v. Cannon (1958), Ind. App. 150 N. E. 765 4

Petro v. State (1933), 204 Ind. 401 3

Constitution of the State of Indiana 2

Constitution of the United States 2

Appendix A 6

Appendix B 26

IN THE

Supreme Court of the United States

October Term, 1960

No. 696

WILLIAM J. ALLISON,

Appellant,

vs.

THE STATE OF INDIANA,

Appellee.

PETITION FOR A REHEARING AFTER DENIAL OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and

To the Honorable Associate Justices of the Supreme Court of the United States:

Appellant-Petitioner, William J. Allison, hereby petitions for a rehearing after denial of his Petition for Certiorari to the Supreme Court of Indiana (Statement as to Juris iction having been treated as Petition for Certiorari).

A rehearing is necessary under Rule 58 of this Court, because of new developments, both of fact and law, which have taken place since the filing of the Statement as to Jurisdiction (now treated as Certiorari in this Court's ruling in denying Certiorari). These new developments also require the presentation of a point which was not presented in the petition (Statement as to Jurisdiction) because at that time Appellant was precluded from presenting certain questions that were alleged in his Fifth Assignment of Error in the Indiana Supreme Court but *were not* included anywhere in his briefs.

Appellant filed his "Verified Petition for Writ of Error Coram Nobis" in the Supreme Court of Indiana on the 25th day of January, 1961, a copy of which is set out in Appendix "A". The Supreme Court of Indiana dismissed said petition of March 2, 1961, and a copy of its order of dismissal is set out in Appendix "B". Significance is added to the above because of the importance of the issues involved in the Writ. By this ruling Appellant Allison is denied his constitutional and inalienable right to a fair and impartial trial; in practical effect Allison has no legal remedy even though the Fifth Assignment of Error in the Indiana Supreme Court and the Allegations in the Verified Petition for Writ of Error Coram Nobis recite substantially the same contention—*The Bias and Prejudice of the Trial Judge* which prevented Allison from receiving a fair and impartial trial as guaranteed him by the Constitution of Indiana and the Constitution of the United States.

We sincerely hope that this Court will not consider this Petition for Rehearing frivolous or malicious when we urge that a substantial ground was available to Appellant although not previously presented in his Statement as to Jurisdiction, viz:

Fifth Assignment of Error

The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself.

The importance of the rulings of a trial court is even more forcibly illustrated when we consider that it is a cardinal principle of law which has universal application in every state in our country that a discretionary ruling by a trial court will not be disturbed on appeal by a receiving tribunal. Thus it inevitably follows that the rulings of a trial judge who was alleged to be biased and prejudiced against the Appellant Allison is of the greatest significance and importance when we see that on Page 11 of Appellant's Statement as to Jurisdiction in this Court that "Inquiry as to arrests of a witness is improper because the law is quite clear that the prosecution in its cross-examination of the defendant is limited to inquiry concerning convictions and not merely arrests. Hawkins v. State (1941), 218 Ind. 116; Petro v. State (1933), 204 Ind. 401," and we further say that on Page 12 Appellant urged the following: "Appellant had the absolute right to cross-examine witness and the trial court erred in excusing a State's witness before the defense had finished cross-examining the witness. Appellant's right to cross-examine a witness under oath is not a rule of procedure or evidence, but is fundamental to due process and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal. Arms v. Pierce, Gov. Co. 12, Ind. App. 566," and the ruling of this Court in the case of Alford v. United States, 282 U. S. 687, which we embodied in Appellant's Statement as to Jurisdiction is as follows: "Appellant's counsel should have been permitted to inquire as to the residence of a witness for the prosecution. The law is well settled that while the

extent of the cross-examination of a witness rests in the sound discretion of the trial court, such a rule cannot be construed to authorize the right to exclude proper cross-examination." McMullin v. Cannon (1958), Ind. App. 150 N.E. 765. Alford v. United States, 282 U. S. 687."

The discretionary ruling of a trial court with reference to the admissibility of evidence, and the extent of cross-examination, is usually not grounds for review by the appellate tribunal unless there is an abuse of discretion, and it necessarily follows that the ruling of the trial judge in the instant case is of the utmost importance considering the fact that the trial judge ruled on his own bias and prejudice in his denying and overruling of Appellant's motion for the Honorable John L. Niblack to disqualify himself, which in effect allowed and permitted the trial judge to rule on his own competency in determining the merits of the motion for change of venue from the judge.

In view of the foregoing, and in view of the fact that the rulings of a trial judge have a profound influence on a jury trying a cause, your Appellant is going to take this unprecedented and unparalleled action and ask this tribunal to reconsider its ruling of dismissal and to examine the record with specific reference to the Fifth Assignment of Error, namely, "The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself," which the Indiana Supreme Court did not rule upon, which Fifth Assignment of Error contained the same reasons assigned in Allison's Verified Petition for Writ of Error Coram Nobis, and we sincerely hope that our action in beseeching this august tribunal to search the record with reference to the Fifth Assignment of Error will not give rise to speculation or conjecture on the part of this Court that we are acting facetiously or maliciously or that we are acting in

any manner to prolong this litigation, and that this Court will believe us when we say that this Petition for Rehearing is well founded in point of law as well as in fact, and that it is not interposed for delay, but that it is made solely to prevent a miscarriage of justice without a legal remedy.

In conclusion, we say that in our opinion this is a case wherein a litigant has been wronged without having a remedy by being denied due process of law and equal protection of the laws in that he has certain constitutional and inalienable rights to a fair and impartial trial by a fair and impartial judge, which has been denied him.

For that reason a rehearing should be granted on the Petition.

Respectfully submitted,

WILLIAM C. ERBECKER,
Attorney for Appellant.

Dated Indianapolis, Indiana
April 14, 1961

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the Appellant-Petitioner in the above entitled cause and that, in my judgment, the foregoing Petition for Rehearing is well founded in point of law as well as in fact, and that the said Petition is not interposed for delay and that said Petition is restricted to grounds permitted by Rule 58 of this Court.

William C. Erbecker

WILLIAM C. ERBECKER,
Attorney for Appellant.

Dated: April 15, 1961
Indianapolis, Indiana

(Appendices Follow)

APPENDIX "A"

IN THE SUPREME COURT OF INDIANA

(Original Action)

THE STATE OF INDIANA
vs
WILLIAM J. ALLISON
No. 30055

VERIFIED PETITION FOR WRIT OF ERROR CORAM NOBIS

Comes now the defendant in the above entitled cause, being the petitioner in this Verified Petition for Writ of Error Coram Nobis, and respectfully represents and shows to this Honorable Tribunal as follows:

1.

That he is filing this Petition for Writ of Error Coram Nobis as an original action in the Supreme Court of Indiana pursuant to and by virtue of the decision handed down by this Court in the case of Partlow vs. The State, 191 Ind. 657, and 195 Ind. 164, and for the further reason that the grounds and reasons sought herein occurred after the trial and judgment in the lower Court and after judgment was rendered therein and while this cause was being prosecuted and presented on appeal to this Court.

2.

That your petitioner now beseeches this Court to hear and entertain this petition as an original action because of the fraud perpetrated on defendant, all as hereinafter set

out in this petition, and because the errors and fraud complained of occurred subsequent to the judgment rendered in the Trial Court, and prior to the submission of this cause to this Court, and because this original action is the only method and procedure available to the defendant-petitioner wherein he can set out for review for this Court all the facts by which his judgment of conviction was fraudulently obtained, and wherein he was precluded and prevented from having a fair determination and review by this Court of the facts and circumstances wherein his constitutional rights were denied him.

3.

A brief resume of the question raised and presented is as follows:

On the 23rd day of May, 1957, the Grand Jury of Marion County, Indiana returned an indictment against your petitioner in two counts charging a misdemeanor of Disorderly Person while using the telephone. The charge was filed in the Criminal Court of Marion County, Division 1, presided over by Scott A. McDonald, Regular Judge of said Court; a change of venue from judge was timely and properly filed, and thereupon the said Scott A. McDonald offered a panel of three from which a Presiding Judge was to be selected; namely, A. Richard Fulmer, Keith Reese, and the Honorable John L. Niblack, Regular Judge of Marion Circuit Court. Your defendant-petitioner struck the name of Keith Reese, for reasons of which appeared in an affidavit which is attached to this motion, the State of Indiana struck the name of A. Richard Fulmer, leaving the Honorable John L. Niblack chosen as Special Judge to try this cause. The Honorable John L. Niblack qualified as Judge and accepted jurisdiction, and before arraignment was held, your

defendant-petitioner filed a motion entitled *Verified Motion* requesting that the Honorable John L. Niblack disqualify himself from the serving as judge in the above entitled cause, a copy of which motion is attached hereto, made a part of this petition and for identification marked Exhibit "A"; thereupon the Honorable John L. Niblack overruled and denied said motion; thereupon your petitioner-defendant filed his motion to quash each count of the indictment, and said *Motion to Quash* was overruled. Trial was had by jury and the jury returned a verdict of guilty as to each count of the indictment and the Court thereupon sentenced your defendant-petitioner to a period of six months in the Marion County jail and fined him Five Hundred Dollars and costs on each count. Your defendant-petitioner filed a motion for a new trial and the same was by the Court overruled. Prayer for appeal was filed, bond was set and defendant-petitioner timely prosecuted his appeal, and this cause was submitted in and to the Supreme Court of Indiana on September 10th of 1958, bearing number 29714.

At the time of the submission, defendant-appellant timely and properly filed his Assignment of Errors which were as follows, to-wit:

Comes now the appellant and says that there is manifest error in the proceeding and judgment of the trial court prejudicial to him in that:

1. The trial court erred in overruling appellant's Motion to Quash each count of the Indictment.

2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the Indictment.

3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the Indictment.

4. The trial court erred in overruling appellant's Motion for a New Trial.

5. *The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself.*

WHEREFORE, appellant prays that the judgment of the trial court be reversed and for all other proper relief in the premises.

Appellant's brief was filed on January 7, 1959, and *nowhere in appellant's brief is there mention or reference* to the 5th Assignment of Error; namely, *THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JOHN L. NIBLACK TO DISQUALIFY HIMSELF.* Your defendant-petitioner most vehemently contends that the failure, negligence and refusal of his counsel to present, embody, enumerate, incorporate, and allege this Assignment of Error in his brief constitutes sufficient grounds and sufficient reasons to now present this flagrant violation and denial of your defendant-petitioner's rights to the attention of this Court as an original action herein.

Petitioner-defendant further says that after the Honorable John L. Niblack overruled and denied said motion requesting that the Honorable John L. Niblack disqualify himself from serving as judge in this cause as aforesaid, the said John L. Niblack subsequently made rulings which were assigned as independent error in appellant's brief along with the various grounds and reasons assigned in the motion for a new trial, and a resume of them is as follows:

(a) Refusal of trial court to allow trial counsel, Edwin J. Ryan, to cross examine State's witnesses;

(b) Adverse rulings of the trial court on Offers to Prove;

(c) Adverse ruling of the trial court on various questions propounded;

(d) Adverse ruling by the trial court sustaining objections by the State;

(e) Adverse ruling by the trial court on admissibility of certain evidence concerning telephone conversations of matters made prior to the enactment of the law in question;

(f) Adverse ruling of the trial court on Motion to Quash;

(g) Adverse ruling of the trial court on Motion for New Trial.

Petitioner-defendant further alleges and says that to support and buttress his motion requesting that the Honorable John L. Niblack disqualify himself from serving as judge in the trial below, counsel Joseph L. Kivett filed his supporting affidavit on the motion to disqualify, a copy of the affidavit of Joseph Kivett is attached hereto, made a part of this petition hereof and for identification marked Exhibit "B".

6.

Petitioner-defendant Allison further says that he was most vehement in his numerous requests and protestations that his counsel embody, present and incorporate in his Appellant's Brief the 5th Assignment of Error; namely, "The trial court erred in overruling appellant's motion for John L. Niblack to disqualify himself", but that his counsel and attorney of record in this Court utterly disregarded the wishes, pleadings and demands of your defendant-petitioner and failed, neglected and refused to present, embody and incorporate same in said Appellant's Brief, well knowing the necessity therefor and the legal import thereof. That

the refusal, failure and negligence of counsel to incorporate said Assignment of Error in your defendant-petitioner's original brief fraudulently deprived him of having this august tribunal examine, pass upon and adjudicate the glaringly apparent fraud perpetrated upon him aforesaid as shown therein. The failure, negligence and refusal of your defendant-petitioner's counsel to incorporate this Assignment of Error permitted the Honorable John L. Niblack *alone* to pass on his qualifications as trial judge, and fraudulently deny your defendant-petitioner the right to legally determine and adjudicate the correctness of Trial Court's ruling, and as a result thereby your petitioner's constitutional rights were invaded, prejudiced and denied by your petitioner's inability to have this question raised and presented for this Court's determination.

7.

Petitioner-defendant further alleges and says that this Court did not have all of the errors assigned and presented in the Assignment of Errors filed in this Court at the time of the submission of this cause presented for their perusal and study in this appeal, and your defendant-petitioner was fraudulently prevented and deprived from having this Court pass upon the 5th Assignment of Errors; namely, "The Trial Court erred in overruling appellant's motion for John L. Niblack to disqualify himself," and consequently this Honorable Court did not have the opportunity to pass upon this assigned error; and this Honorable Court was mistaken in the facts in this case in assuming that your defendant's constitutional rights were fully, amply and completely defended and protected in said appeal; that a fraud was perpetrated upon your defendant by this Assignment of Error in not being presented to this Court by brief of otherwise, and that the only method, means and

manner by which your defendant-petitioner can have his constitutional rights protected is for this Court to hear and entertain this Petition for Writ of Error Coram Nobis as an original action in this Court by reason of the fradulent acts aforesaid.

8.

Petitioner further alleges and says that if this Court grants the petitioner the right to present this case for determination herein it will be necessary for petitioner herein to call several witnesses, and petitioner requests that he may be permitted to introduce evidence and witnesses in this cause to supplement, implement, buttress and sustain the allegations hereinbefore set out.

9.

Petitioner further alleges and says that for another and further ground and reason for requesting this court to entertain this cause as an original action is that his physical condition has deteriorated to such an extent due to his heart trouble, diabetes, hypertension, gout and general infirmities he is now and has been for the past two years bedfast and unable to leave his bed, and in order to dispense with a multiplicity of trial court procedures and to avoid the delay occasioned thereby and to expedite this hearing in the interest of justice, *he respectfully requests this court to hear and entertain this Verified Petition for Writ of Error Coram Nobis.*

10.

Petitioner further alleges and says that the Exhibits attached hereto; namely, the Verified Motion of William Allison requesting that the Honorable John L. Niblack disqualify himself from serving as judge in the above entitled cause, and the Exhibit entitled the Affidavit of Joseph L.

Kivett, are copied verbatim from the transcript filed in this Court which was submitted in this Court on September 10, 1958, and which have been made a part of the record therein, all of which was available to your defendant's counsel at the time of the preparation and filing of his appellant's brief in the appeal.

WHEREFORE, your petitioner herein respectfully prays this Honorable Court that a Writ of Error Coram Nobis issue out of and under the seal of this Court, and that this Court permit petitioner to file this petition and that the Court hear and entertain the same, and that this Court permit testimony to be introduced herein as it deems advisable, and that upon a hearing thereof, that this Court vacate, set aside and hold as naught the judgment of conviction heretofore entered against your petitioner, and that a new trial be granted, *or in the alternative*, that this Court grant permission for your petitioner-defendant to file motion for new trial in the Trial Court, and that the Criminal Court of Marion County, Division 1, be directed, ordered and authorized to receive and act on a motion for a new trial by your defendant-petitioner, and that said Trial Court be ordered, directed and authorized, to receive, hear and entertain said motion for a new trial; on the grounds hereinbefore alleged, and that said Trial Court investigate, determine and decide the truth or falsity of the matters alleged in this petition, all as alleged herein; and that the Trial Court do, permit and perform all actions and things necessary for a proper presentation, determination and adjudication of these questions herein presented, and for all other further, proper and complete relief as the premises may require.

Respectfully submitted,

/s/ William J. Allison

WILLIAM J. ALLISON

William J. Allison, being duly sworn upon his oath, deposes and says that the matters, facts, statements, averments and allegations contained in the foregoing petition for Writ of Error Coram Nobis are true to the best of his knowledge, information and belief.

Further affiant saith not.

/s/ William J. Allison
WILLIAM J. ALLISON

STATE OF INDIANA
SS:
COUNTY OF MARION

Subscribed and sworn to before me, a Notary Public, in and for said county and state, this 24 day of January, 1961.

/s/ Remster A. Bingham
Notary Public

My commission expires:
April 20, 1964
(SEAL)

STATE OF INDIANA
SS:
COUNTY OF MARION

AFFIDAVIT

William Allison, being duly sworn upon his oath, deposes and says that he is the same William Allison who was the appellant in a cause entitled, William Allison, alias William T. Allison vs. The State of Indiana in a certain cause numbered 29714 which was submitted and filed in Supreme Court on September 10, 1958 and that a short time after the overruling of his motion for a new trial in the Trial Court and prior to the submission of this cause in the Indiana

Supreme Court, he requested, urged and demanded that there be incorporated in his Appellant's Brief on appeal the following Assignment of Error; namely, Assignment of Error No. 5, as follows: "The Trial Court erred in overruling appellant's motion for John L. Niblack to disqualify himself," and that his counsel on several occasions verbally agreed and acquiesced to incorporate the same therein but he nevertheless failed, neglected and refused so to do; that defendant's counsel failed to personally perform the services so requested, and delegated the same to subordinate and junior counsel in the case, and defendant-petitioner's counsel of record failed, neglected and refused on many occasions to personally supervise the incorporation of the assignment of errors in said brief and as a result thereby, this delegation of authority by counsel contributed to the fraud perpetrated upon your defendant. That during the preparation and assembling of said brief, your defendant-petitioner was advised by his counsel that the said 5th Assignment of Error concerning the disqualification of the Honorable John L. Niblack was fully and completely incorporated in said brief; that your defendant-petitioner relied upon these representations of his counsel and believed that these constitutional questions would be incorporated in said brief. That at all times during the preparation of defendant-appellant's brief, your defendant-petitioner was led to believe and did believe that the aforesaid question was incorporated therein for determination by this Court. That defendant-petitioner had friends and acquaintances advise and request his attorney on several occasions, in the presence of defendant petitioner, to emphasize the importance of bringing to the attention of the Supreme Court the motion for disqualification of the said John L. Niblack, which motion the said John L. Niblack had denied in the Court below.

Further affiant saith not.

/s/ William J. Allison

WILLIAM J. ALLISON

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 24 day of January, 1961.

/s/ Gensler A. Bingham

My commission expires:
April 20, 1964

IN THE CRIMINAL COURT OF MARION COUNTY
DIVISON NO. ONE

STATE OF INDIANA
COUNTY OF MARION } SS:

THE STATE OF INDIANA
vs.
WILLIAM JOHN ALLISON alias
WILLIAM THOMAS ALLISON } NO. CR 17545 Y

VERIFIED MOTION OF WILLIAM T. ALLISON REQUESTING THAT THE HONORABLE JOHN L. NIBLACK DISQUALIFY HIMSELF FROM SERVING AS JUDGE IN THE ABOVE ENTITLED CAUSE

William T. Allison, being first duly sworn upon his oath, says:

1. He is the defendant in the above entitled cause which is a criminal proceeding consisting of an indictment con-

taining two counts, each charging the defendant with being a disorderly person.

2. The defendant, knowing he could not obtain a fair and impartial trial of said cause before the Honorable Scott A. McDonald, the regularly elected, qualified and acting judge in the above matter, and who presided over said court at the time of the return of the indictment, did on June 15, 1957, file an affidavit and motion for a change of judge from the said Honorable Scott A. McDonald.

3. On the same day, to-wit, June 19, 1957, said motion and affidavit for change of judge was sustained and at that time the said Honorable Scott A. McDonald submitted as a panel of judges the names of Richard Fulmer, Keith C. Reese and your Honor, John L. Niblack.

4. The defendant having filed the change of venue from the judge had the first strike and struck the name of the Honorable Keith C. Reese. The State struck Richard Fulmer. The reason for eliminating the said Keith C. Reese was due to the fact that said Keith C. Reese is a former deputy prosecuting attorney of the Nineteenth Judicial Circuit of Marion County, State of Indiana, and was such at the time said prosecuting attorney's office filed numerous affidavits against this defendant, the defendant having been acquitted or said charges having been dismissed. Also, said Keith C. Reese is either a partner or associated in the same law firm with the Honorable Charles C. Daugherty, the present judge of the Magistrate Court of Marion County, Division Two.

5. The said Keith C. Reese was aware of the fact that this defendant had had difficulties with the prosecuting attorney of the Nineteenth Judicial Circuit and also that he had had difficulties with the Honorable Charles C. Daugherty. In view of this situation the defendant knew he could

not obtain a fair and impartial trial of said cause before the said Keith C. Reese.

6. This affiant is one and the same William T. Allison who was charged and found guilty by the Honorable Charles C. Daugherty, Judge of the Magistrate's Court at Speedway, and holding said office by virtue of an appointment of Your Honor, John L. Niblack.

7. On or about 6:00 P.M. May 17, 1957, this affiant was taken into custody by the Sheriff of Marion County, Indiana, while he was at his home in the City of Indianapolis, Marion County, Indiana. He was taken into custody by virtue of a charge of direct criminal contempt filed by the Honorable Charles C. Daugherty, who after filing the charge of criminal contempt issued a warrant for the body attachment of this defendant. The Court also ordered that this defendant was not to be allowed to furnish any bond.

8. Said defendant employed the law firm of Kivett and Kivett and Sam Blum to represent him in said matter and on Saturday morning, May 18, 1957, this affiant is informed that Joseph L. Kivett, one of his attorneys, telephoned the home of Your Honor to inquire if he could present to his Honor a petition for a Writ of Habeas Corpus and that Your Honor explained to the said Joseph L. Kivett that his court was not in session and to bring the matter over to his court on Monday, May 20, 1957.

9. In the meantime this defendant was ordered to report before Judge Daugherty to be tried on the direct criminal contempt charge Monday evening at 7:30 P.M. in the Magistrate Court at Speedway City, Indiana. On the morning of May 20, 1957, affiant is informed the said attorneys for this defendant filed the petition for Writ of Habeas Corpus and were advised by His Honor that due

to the press of business and the fact there were other petitions for writs filed ahead of this defendant's writ, it would be impossible to hear the same before Tuesday, May 21, 1957.

10. The defendant further says that he has been advised by one of his attorneys, Joseph L. Kivett, that on Monday morning, May 20, 1957, your Honor advised the said Joseph L. Kivett that probably the petition for a Writ of Habeas Corpus should not be filed in his court anyhow for the reason that: "Mr. Allison" (the defendant herein) and himself had had some difficulties over a contempt of court proceeding which was finally settled by the Supreme Court.

11. The defendant would further show to the Court the fact that your Honor and this defendant did have difficulty which was decided by the Supreme Court in September, 1944, which case is reported in 222 Indiana Supreme Court Reports, page 602, 56 Northeastern 2d, page 493, and is captioned, State Ex Rel. Allison v. Marion Municipal Court Room 4, and John L. Niblack, Judge of the Marion Municipal Court Room 4.

12. On May 20, 1957, at about the hour of 7:30 P.M. this defendant was tried and found guilty of the charge of direct criminal contempt of court and was given the maximum sentence under the statute, to-wit, fined $500.00 and sentenced to the county jail for ninety days, and a request to have an appeal bond set was denied. This trial was had before Charles C. Daugherty, the then and now Judge of the Magistrate Court of Marion County, Division Two, said Charles C. Daugerty holds his office by virtue of an appointment by your Honor.

13. After this defendant's conviction of direct criminal contempt he was advised by one of his attorneys, Joseph L. Kivett, that the petition for Writ of Habeas Corpus

filed in your Honor's court would be to no avail for the reason that there was now an adjudication of guilt and said attorney suggested that the petition or complaint for a Writ of Habeas Corpus be dismissed and further proceedings taken direct to the Supreme Court of the State of Indiana. This defendant directed his attorneys to proceed forthwith.

14. On May 23, 1957, at about the hour of 3:00 P.M. the Supreme Court issued a mandatory order directed to the Honorable Charles C. Daugherty directing said judge to set a reasonable bond for this defendant or in the alternative to show cause why he refused to set said bond.

15. The Sheriff of the Supreme Court served said notice upon the said Charles C. Daugherty while he was sitting either as Special or judge pro tem in the Criminal Municipal Court of Marion County, Room No. 3.

16. Joseph L. Kivett, one of the attorneys for this defendant, advises this affiant that after the said Sheriff of the Supreme Court served said order upon the said Charles C. Daugherty, the said Sheriff departed from the court room and that the said Judge Daugherty addressed himself to said Joseph L. Kivett and said he would have to call the boss to see what he should do about fixing a bond, that the said Joseph L. Kivett inquired who was the boss and the said Judge Daugherty answered, "Judge Niblack." The said Judge Daugherty advised the said Joseph L. Kivett, so this affiant is informed, that he and Judge Niblack had discussed the matter of the bond and had decided to probably fix a bond in the sum of $5,000.00 the next day, and further stated that he had so advised Mr. Sam Blum, one of the attorneys for the defendant, of said discussion. Whereupon the said Joseph L. Kivett acknowledged that he had been informed of such conversation but stated that in view of everything

that had transpired in this case he was not relying upon promises and felt he should proceed as the law provided.

17. Affiant further states that the said Joseph L. Kivett stated that the said Judge Niblack was not in court and was not present at the time of the conversation above related and that the court over which the said Judge Daugherty was presiding was not in session.

18. The defendant herein files with this petition the original affidavit of Joseph L. Kivett which supports the allegations contained in rhetorical paragraphs 16 and 17 and also relative to the conversation of Your Honor and the said Joseph L. Kivett on May 10, 1957, marks the same Exhibit A and makes it a part of this motion and petition.

19. The defendant would further show to the Court that when he was languishing in the Marion County Jail without being afforded the right to furnish bail, the newspapers of Indianapolis published editorials and by innuendo possibly became critical of Your Honor. Your Honor wrote letters in response to these editorials which appeared in each of the papers, both the editorials and response concerned this defendant and also concerned Your Honor. Needless to say, the defendant had nothing to do with either the preparing or publishing of any of the articles.

20. The Constitution of the State of Indiana, among other things, guarantees to this defendant the right to a fair and impartial trial before a fair and impartial judge and jury, if the case is tried before a jury. The law also presumes this defendant to be not guilty. This defendant knows that if His Honor sits as judge he cannot obtain a fair and impartial trial.

21. Affiant states that he is not charging either directly or by innuendo that His Honor is not honest.

22. The defendant would further show to this Court that he is innocent of the charges in this case and is not guilty. The defendant does not believe that the indictment returned against him is sufficient and also believes that the act under which the indictment is brought is unconstitutional. These respective questions will be raised by appropriate motions at the proper time and the Court will be called upon to interpret the law.

23. In addition, the facts in this matter will show that there has been much publicity attached to the alleged activities of this defendant and there has been much discussion of this case among diverse persons in Indianapolis and Marion County and it may be necessary for this defendant to file an application for a change of venue from the county. Certainly in a situation of this kind this defendant is entitled to have sitting as a judge a person who could not possibly have any interest one way or the other in said matter and who could be completely and unequivocally free to make his own decision based solely upon the law and the evidence and not from any information gained by hearsay or by personal contact with the man standing before him for trial and judgment.

24. This affidavit is not made for the purpose of delay, is made in the best of faith and defendant asks that the Court sustain the same, and for such order as the Court deems just and proper.

/s/ William T. Allison

Subscribed and sworn to before me this 8th day of July, 1957.

/s/ Mildred Rainwater

My commission expires:
May 23, 1961

EXHIBIT "B"

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT OF
JOSEPH L. KIVETT

Joseph L. Kivett, being first duly sworn upon his oath, says that he is a member of the law firm of Kivett and Kivett, attorneys, 1019 Illinois Building, Indianapolis, Indiana, and was such at all times mentioned in this affidavit.

1. Among the clients of said firm of Kivett and Kivett is William T. Allison, and this affiant and his said firm have in the past and do now represent the said Allison in several different matters, both criminal and civil.

2. That on Friday, May 17, 1957, between the hours of 4:30 and 7:30 P.M. of said date, the said Allison was arrested on a body attachment issued by the Honorable Charles C. Daugherty, a Magistrate Judge of Marion County, on a charge that the said Allison was guilty of direct criminal contempt of the court over which the Honorable Charles C. Daugherty presided.

3. At the time of said arrest the said affiant was in the City of Greencastle, Putnam County, Indiana, where he had been for two weeks participating in the trial of a jury case and was awaiting the results of the deliberation of the jury. This affiant was called by telephone by his brother, Silas C. Kivett, Jr., and advised of the situation and this affiant advised his said brother to explore the possibility of getting some relief through a writ of Habeas Corpus.

4. On Saturday morning, May 18, 1957, between the hours of 8:30 and 10:00 A.M., this affiant did telephone the Honor-

able John L. Niblack, Judge of the Marion Circuit Court, and inquired if the Judge could see his way clear to granting a writ of Habeas Corpus in the Allison matter provided we would bring the same out to his house. The said judge was very courteous but stated that his court was not in session and would prefer for us to bring the matter to him on Monday morning, May 20, 1957. On Monday morning, May 20, 1957, the petition for Writ of Habeas Corpus was filed and the matter presented to His Honor, Judge John L. Niblack.

5. At the time of the presentation the said Honorable John L. Niblack advised this affiant and his brother, Silas C. Kivett, Jr., that at least two or three writs for habeas corpus were filed ahead of the one we had filed and the Court's time would not permit him to give us a hearing before 9:30 A.M. on Tuesday, May 21, 1957. This affiant advised the Court that unless a petition for a Writ could be heard that day, May 20th, that the trial on the direct criminal contempt charge was set for that evening, May 20, 1957, at 7:30 P.M.

6. The court then explained to this affiant and his said brother that we were probably making a mistake to present the matter to him at all for the reason that he had had some difficulty with the said Allison when he was judge of Marion County Criminal Municipal Court, Room 4, and that it had become necessary for the Supreme Court of Indiana to decide the issue.

7. Thereafter, on May 23, 1957, the Supreme Court of this state issued a Writ of Mandate against the said Judge Charles C. Daugherty directing the said Judge Daugherty to provide a reasonable appeal bond in said contempt matter or to show cause why he should not do the same. This affiant was present in Marion County Criminal Municipal

Court Room 3 where the said Judge Daugherty was acting as special judge when said order was served upon the said Judge Daugherty by the Sheriff of the Supreme Court of Indiana. After serving the said order the said Sheriff departed the court room and the said Judge Charles C. Daugherty turned to this affiant and said that he was not going to do anything, or words to that effect, until he talked to the boss. This affiant asked who was the boss and the said Judge Daugherty informed him that it was Judge Niblack. Said Judge Niblack was not present when said statement was so made.

8. Said Judge Daugherty further stated to this affiant that Judge Niblack and himself had discussed the matter earlier that day and had decided that they would probably set a bond at $5,000.00 and that it would not have been necessary to obtain a writ of mandate from the Supreme Court. The said Judge Daugherty advised the affiant that he had informed Mr. Blum of this fact and this affiant acknowledged that Mr. Blum had informed him of the conversation but this affiant explained to the Court, that is Judge Daugherty, that because of the way the entire matter was being handled affiant felt it best to proceed in the Supreme Court as by law provided and to not rely on any oral negotiations.

Further affiant saith not.

/s/ Joseph L. Kivett

Subscribed and sworn to before me this 8th day of July, 1957.

/s/ Mildred Rainwater

My commission expires:
May 23, 1961
(Seal)

APPENDIX "B"

EDWIN K. STEERS,
Attorney General of Indiana
PATRICK D. SULLIVAN,
Deputy Attorney General.
Attorneys for Respondent.

WILLIAM C. ERBECKER,
Indianapolis, Indiana,
Attorney for Defendant-Petitioner.

IN THE

SUPREME COURT OF INDIANA

THE STATE OF INDIANA *Respondent,* vs. WILLIAM J. ALLISON, *Defendant-Petitioner.*	No. 30055

ORIGINAL ACTION

PER CURIAM

The petitioner, William J. Allison, has filed in this court what he designates as a writ of error coram nobis. His petition reveals that he had previously been convicted in the trial court and took an appeal to the court on September 10, 1958, which was determined by this court in *Allison* v. *State* (1960), ——Ind.——, 166 N.E. 2d 171.

The State of Indiana has filed a motion to dismiss the petition herein on the ground that this court has no original jurisdiction to entertain a petition for a writ of error coram nobis. This principle is well established in *Stephenson* v.

State (1932), 205 Ind. 141, at page 194, 179 N.E. 633, 186 N.E. 293 and *Lake* v. *State* (1947), 225 Ind. 76, 72 N.E. 2d 746.

For the reasons stated the petition is dismissed.

BOBBITT, C. J. NOT PARTICIPATING.